Exhibit 3

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHN LENNARTSON, on behalf of himself and all others similarly situated,

Plaintiff,

v.

PAPA MURPHY'S HOLDINGS, INC.; and PAPA MURPHY'S INTERNATIONAL, L.L.C.,

Defendants.

No. 3:15-cv-05307-RBL

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR STAY

NOTE ON MOTION CALENDAR: October 16, 2015

ORAL ARGUMENT REQUESTED

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

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KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

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KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

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KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

INTRODUCTION

Defendants Papa Murphy's Holdings, Inc. and Papa Murphy's International, L.L.C. (collectively, "Defendants") all but concede that they failed to comply with the written consent requirements of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* Under those requirements, Defendants must have obtained a signed agreement from Plaintiff disclosing that Defendants would send text message advertisements to his cell phone using an autodialer and that Plaintiff's consent was not a condition of purchase.

Having failed to comply with those requirements, Defendants say they do not apply. In 2012, following notice-and-comment rule-making, the Federal Communications Commission ("FCC") published the written consent requirements in an order ("2012 Order"). Defendants claim, however, that the 2012 Order was unclear as to whether Plaintiff's consent form was grandfathered. According to Defendants, it was not until the FCC issued a clarifying order in July of this year ("2015 Order") that they realized the error of their ways, and thus, the 2015 Order should not apply retroactively.

The crux of Defendants' theory is their convenient misinterpretation of the 2012 Order. But a mistake in the law is not a defense. Nor can Defendants hide behind the 2015 Order, which merely clarified existing law and, therefore, is presumptively retroactive. "Clarifying the law and applying that clarification to past behavior are routine functions of adjudication." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007). Moreover, Defendants fail to mention that, even after the 2012 Order went into effect, Defendants **continued not to comply** with the written consent requirements going forward, signing up consumers for their text message program using non-compliant language. Apparently, Defendants did not understand the 2012 Order to have any effect whatsoever—either on existing consents or consents obtained after its effective date.

Since Defendants' mistake in reading the 2012 Order is a slim reed upon which to base their summary judgment motion, Defendants resort to challenging the written consent requirement on First Amendment grounds. This Court, however, does not have jurisdiction to hear that

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

challenge under the Hobbs Act. And in any event, the written consent requirement—which affects purely commercial speech—easily survives intermediate scrutiny.

Finally, if all else fails, Defendants seek a stay of the case. Defendants want this court to await the Supreme Court's decision in *Spokeo, Inc. v. Robins*. Review was granted in that case almost six months ago, during which time Defendants answered the Complaint, submitted a Rule 26(f) report, exchanged Rule 26(a) disclosures, and then moved for summary judgment on the merits. But, under the guise of judicial economy, Defendants now want to stay the case. In any event, *Spokeo* has no bearing here, where Plaintiff and the Class have alleged they suffered actual harms. For all of these reasons, Defendants' motion should be denied in its entirety.

STATUTORY BACKGROUND

Congress enacted the TCPA in response to "[v]oluminous consumer complaints" and "outrage[]" over the proliferation of intrusive, nuisance telemarketing practices. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744–45 (2012). In doing so, Congress sought to "protect the privacy interests of telephone subscribers." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). The invasion of advertising text messages[1] is particularly intrusive, because many consumers carry their cell phones with them at almost all times. And unlike other forms of advertising, text messages cost recipients money. Cell phone users frequently pay their wireless service providers for each text received, or incur a usage allocation deduction to their text plans, regardless of whether they authorized the message. (Compl. ¶ 19, ECF No. 1.) "These costs can be substantial when they result from the large numbers of … texts autodialers can generate." *In re Rules & Regulations Implementing the TCPA of 1991*, 30 FCC Rcd. 7961 ¶¶ 118 (July 10, 2015).

Accordingly, the TCPA provides heightened protections for cell phone users by banning:

> any call (other than a call made for emergency purposes or made with the **prior express consent** of the called party) using any automatic telephone dialing system … to any telephone number assigned to a … cellular telephone service … or any service for which the called party is charged for the call.

[1] Under the TCPA, a "call" includes text messages to wireless numbers. *Satterfield*, 569 F.3d at 955.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

27 U.S.C. § 227(b)(1)(A).[2] In other words, the TCPA prohibits calls made (1) to cell phones (2) using an autodialer[3]—two elements of a prima facie TCPA claim that Defendants do not dispute in their motion. *See Grant v. Capital Mgmt. Servs.*, L.P., 449 F. App'x 598, 600 & n.1 (9th Cir. 2011). Defendants started their "text messaging program in April of 2011 as a way to offer discounts to its customers and drive business." (Brawley Decl. ¶ 2, ECF No. 21.) Moreover, "its third-party vendor transmitted a text message matching the screenshot contained in the Complaint." (Defs. Answer ¶ 22, ECF No. 14). Indeed, Defendants have stated that "offers are blasted" based on its mobile database.[4]

The only exceptions to the ban on autodialed calls to cell phones are those made for emergency purposes or with "prior express consent." 27 U.S.C. § 227(b)(1)(A)(iii). As to prior express consent, it is an affirmative defense for which Defendants bear the burden of proof.[5] *Grant*, 449 F. App'x at 600. While the statute does not define prior express consent, Congress delegated the authority to make implementing rules and regulations to the FCC. 47 U.S.C. § 227(b)(2). Pursuant to that authority, the FCC has issued several orders interpreting the prior express consent defense.

In 1992, the FCC issued its first order implementing the TCPA. The FCC said that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In re Rules & Regs. Implementing the TCPA of 1991*, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992). But in 2012, the

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[2] All bolded text in quotations cited herein are added, unless otherwise indicated.

[3] An "autodialer" is a computerized automatic telephone dialing system that stores telephone numbers in a database or dials random or sequential numbers and is used to transmit the same or substantially the same text messages *en masse* to thousands of wireless telephone numbers. (Compl. ¶ 24.)

[4] Hoidal Decl., Ex. G (attaching Rimma Kats, *Papa Murphy's grows mobile database, pushes offers via SMS campaign*, Mobile Commerce Daily (Sept. 23, 2011), *available at* http://www.mobilecommercedaily.com/papa-murphy%E2%80%99s-grows-mobile-database-pushes-offers-via-sms-campaign).

[5] The FCC places the burden of proving consent on the caller. See 2012 Order ¶ 33. *But see Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (listing consent as an element of a TCPA claim, rather than a defense).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

FCC changed course. After finding "significant ongoing consumer frustration reflected in [its] complaint data," the FCC said: "we ... revise our rules to require prior express **written consent** for all autodialed ... telemarketing calls to wireless numbers." *In re Rules & Regs. Implementing the TCPA of 1991*, 27 F.C.C.R. 1830 ¶¶ 2, 19 (Feb. 15, 2012) ("2012 Order"). Such written consent is defined as follows:

> an agreement, in writing, bearing the signature of the person called that … shall include a clear and conspicuous disclosure informing the person signing that:
>
> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

47 C.F.R. § 64.1200(f). In other words, to satisfy the written consent requirements, the signed agreement must include a clear and conspicuous disclosure that (1) the company will call using an autodialer and (2) consent is not a condition of purpose.

Although the written consent requirements were released on February 15, 2012, they did not go into effect until twenty months later on October 16, 2013. *See* 2012 Order ¶ 66, *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-2902, 2012 WL 5511039, at *4 (N.D. Ala. Nov. 9, 2012). The FCC sought to provide "a reasonable time for affected parties to implement necessary changes." 2012 Order ¶ 66. The FCC also addressed whether existing consents that did not satisfy the new rule would remain valid after October 16, 2013—i.e., whether existing consents were grandfathered. The FCC said: "Once our written consent rules become effective, [] an entity will no longer be able to rely on non-written forms of express consent to make autodialed … telemarketing calls, and thus could be liable for making such calls absent prior **written consent**." *Id.* ¶ 68.

The day following the effective date of the written consent requirements, the Coalition of Mobile Engagement Providers and the Direct Marketing Association petitioned the FCC for relief

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

from the written consent requirements. The FCC addressed their petitions (among others) in an order released on July 10, 2015. *See In re Rules & Regulations Implementing the TCPA of 1991*, 30 FCC Rcd. 7961 ¶¶ 3 n.7 & 102 (July 10, 2015) ("2015 Order"). In the 2015 Order, the FCC clarified that the 2012 Order did not grandfather existing consents that did not satisfy the written consent requirements. *Id.* ¶ 100. The FCC, however, granted the petitioners a limited waiver to allow additional time to comply with the written consent requirements. No waiver was provided for entities that did not petition the FCC on this issue (like Defendants here), except to the extent that these entities were members of the petitioning association. *Id.* ¶ 102. As to entities not covered by the limited waiver (including Defendants here) the FCC affirmed:

> It follows that the [written consent requirement in the 2012 Order] applies *per* call and that telemarketers should not rely on a consumer's written consent obtained before the current rule took effect if that consent does not satisfy the current rule.

Id. ¶ 100 & Erratum.[6] In summary, companies cannot rely on consents obtained before October 16, 2013, if such consents did not otherwise satisfy the new written consent requirements.

FACTUAL BACKGROUND

Defendants marketed and promoted their products and services through text message advertisements sent to cell phones of consumers throughout the nation. (Compl. ¶ 3.) Most cell phones immediately alert the recipient of new text messages. This instantaneous nature of text messaging makes it very appealing to companies, and very annoying to consumers subjected to them. But, as Defendants noted, "when we can get on [consumers'] handsets, we can get their attention and really use it to drive traffic."[7] Defendants "have instructed [their] markets to be as aggressive as possible with text [messaging]" because they "want people to act now with it."[8]

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[6] "Erratum" refers to an amendment to the 2015 Order released by the FCC on July 28, 2015. The Erratum corrected the quote appearing above. A copy of the Erratum is attached as Ex. F to the Hoidal Declaration.

[7] Chantal Tode, *Papa Murphy's heats up revenue-driving SMS program with personalized messages*, Mobile Commerce Daily (Apr. 2, 2015), *available at* http://www.mobilecommercedaily.com/papa-murphys-heats-up-revenue-driving-sms-program-with-personalized-messages.

[8] Lauren Johnson, *Papa Murphy's expands SMS effort to 26 states, Mobile Commerce Daily* (Aug. 3, 2012), *available at* http://www.mobilecommercedaily.com/papa-murphy%E2%80%99s-furthers-sms-push-with-rollout-program-to-26-states.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

To redress the actual harms Defendants' practices caused, including the nuisance and intrusion upon privacy and seclusion, Plaintiff John Lennartson filed this action. (*See id.* ¶¶ 4, 5; Lennartson Decl.[9] ¶ 2.) Plaintiff brings this suit on behalf of himself as well as the following Class: "All persons or entities in the United States and its Territories who received one or more text message advertisements from or on behalf of Defendants since October 16, 2013." (Compl. ¶ 28.) Thus, this case is limited to Defendants' conduct after the effective date of the 2012 Order.

Significantly, Defendants do not dispute the two elements of a prima facie TCPA claim: Defendants sent text messages (1) to Plaintiff's cell phone (2) using an autodialer. Indeed, Defendants delivered numerous advertisements to Plaintiff's cell phone. (*See* Compl., Ex. A & Lennartson Decl., Ex. A.) While Defendants now chide Plaintiff for not replying "stop," the FCC made clear: "Neither the TCPA nor our related rules place any affirmative obligation on the user of a wireless number … to contact each caller to opt out in order to stop further calls." 2015 Order ¶ 95. Rather, "the TCPA places responsibility on the caller alone to ensure that he or she has valid consent for each call made using an autodialer." *Id.* ¶ 81.

Defendants have now moved for summary judgment on the ground that they obtained Plaintiff's consent, an affirmative defense for which they bear the burden of proof. *Grant*, 449 F. App'x at 600. As explained above, for all text messages sent after October 16, 2013, Defendants must satisfy the written consent requirements in the 2012 Order. Specifically, Defendants must have obtained a signed agreement from Plaintiff that includes a clear and conspicuous disclosure that (1) Defendant will send text messages using an autodialer and (2) Plaintiff's consent is not a condition of purchase. Defendants failed to meet these requirements. The language that appeared on the website purportedly used by Plaintiff to submit his information is silent about Defendants' use of an autodialer, and silent that consent to receive texts is not a condition of purchase. Nor does the website attempt to obtain the Plaintiff's signature. (*See* Brawley Decl. ¶ 5.)

[9] "Lennartson Decl." refers to the Declaration of John Lennartson in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, or in the Alternative, for Stay, submitted contemporaneously herewith.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

In addition to obtaining cell phone numbers through their website, Defendants also obtained cell phone numbers from consumers "sending text messages to specified numbers that appear in Papa Murphy's advertisements." (Brawley Decl. ¶ 3.) An example of one of Defendants' advertisements is included in Exhibit G to the Hoidal Declaration[10].

There can be no dispute that Defendants did not obtain consent from Plaintiff that fully satisfies the written consent requirements in the 2012 Order. Instead, the central issue before the Court is whether those written consent requirements apply in the first instance. Accordingly, for purposes of opposing Defendants' motion, Plaintiff will assume that Defendants have provided the image of the website through which Plaintiff purportedly submitted his information.

Two details about that image, however, are worth featuring. **First**, the words "Copyright - 2015 Papa Murphy's International, LLC" are at the bottom of the image—which Defendants claim appeared on their website back in March 2012. (Brawley Decl. ¶ 5.) Either the website is not what Defendants claim it is, or Defendants utilized the same website in 2015 as they did in March 2012. If the latter, then Defendants apparently also failed to comply with the new written consent requirements in 2015, well after the effective date of the 2012 Order. Archived pages of Defendants' websites also confirm that Defendants did not comply with the new written consent requirements well after October 16, 2013. (*See* Hoidal Decl., Exs. A–D.) **Second**, the image of the website references short codes different than the short code from which Plaintiff received his text messages from Defendants—raising additional doubts as to whether the image is, in fact, of the website through which Plaintiff purportedly submitted his information. The website references short codes 74499 and 95323 (Brawley Decl. ¶ 5), while Plaintiff received Defendants' text messages from short code 90421 (Compl. ¶ 22).

Two misrepresentations by Defendants also warrant correction. First, while the website disclosed that Defendants would send "**4 text messages per month**" (emphasis in original),

[10] "Hoidal Declaration" or "Hoidal Decl." refers to the Declaration of June Hoidal in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, for Stay, submitted contemporaneously herewith.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Plaintiff received at least seven text messages in April 2015 alone.[11] (*See* Compl., Ex. A.) Discovery may reveal additional instances where Defendants failed to comply with their own disclosures. More importantly, Defendants tout that they "elected to remove [Plaintiff's telephone number] from its offer message marketing lists after receiving the Complaint in this case." (Brawley Decl. ¶ 11.) However, the Summons and Complaint were served on Papa Murphy's Holdings, Inc. on May 11, 2015 (ECF No. 8) and on Papa Murphy's International, L.L.C. on May 13, 2015 (ECF No. 9). Yet Plaintiff continued to receive text messages after those dates, receiving at least eight texts from Defendants between May 16 and June 10, 2015. Because of Defendants' conduct in sending text messages without valid consent, Plaintiff seeks injunctive and declaratory relief and actual damages and statutory damages.

SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A]ll reasonable inferences" must be drawn in favor of the nonmoving party and all evidence construed "in the light most favorable to the party opposing summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Summary judgment is not intended as a substitute for trial and, because summary judgment is an "extreme remedy," it should not be used "unless the movant has established its right to judgment with such clarity as to leave no room for controversy." *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980).

ARGUMENT

I. Defendants Failed to Obtain Consent from Plaintiff that Fully Complied with the 2012 Order Violated the TCPA.

[11] While providing one's telephone number could have constituted consent before the effective date of the 2012 Order, courts have always recognized that consent is limited in scope to the purpose for which it was originally granted. *See Zeidel v. YM LLC USA*, No. 13-cv-6989, 2015 WL 1910456, at *3 (N.D. Ill. Apr. 27, 2015) (stating that "consent is limited in scope to the purpose for which it was originally granted"). Thus, Defendants did not have consent to send unlimited text messages to Plaintiff.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Defendants argue that Plaintiff's provision of his telephone number via the internet constituted consent that—based upon their mistaken reading of the 2012 Order—remained valid after October 16, 2013. According to Defendants, it was not until the 2015 Order that the FCC clarified that consents in writing obtained before October 16, 2013, are no longer valid if they did not otherwise fully comply with the 2012 Order. And, because that order was announced in 2015, Defendants argue it would be inequitable to apply it retroactively in this case. While creative, this argument is unavailing.

A. The FCC did not grandfather existing consents that otherwise did not fully comply with the 2012 Order.

Defendants' argument hinges on their mistaken reading of the 2012 Order. In the 2012 Order, the FCC addressed the effect of its new rule on existing consents obtained under its old rule. It explained:

> One commenter in this proceeding supports the use of consent obtained **under the Commission's existing rules** to authorize continued autodialed … calls for a limited period of time. Because allowing telemarketers to rely on such consent pending the effective date of our new written consent requirement would ease the operational and technical transition for autodialed … calls, we find that it would serve the public interest to permit continued use of **existing consents** for an interim period. For example in cases where a telemarketer has not obtained **prior written consent under our existing rules**, we will allow such telemarketer to make autodialed ... telemarketing calls until the effective date of our written consent requirement, so long as it has obtained another form of prior express consent. Once our written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior **written consent**.

Id. ¶ 68 (footnote omitted). Defendants construct their argument by parsing the last sentence above—stating that the FCC "juxtaposed 'non-written forms of consent,' which would no longer be valid, with 'written consent[s],' which would remain valid." (Mot. at 10.) Based on that "juxtaposition," and ignoring the analysis preceding it, Defendants conclude that "the validity of prior consents would turn only on whether they were in writing."[12] (*Id.*)

[12] Even if that were the case, Defendants' theory does not help them to the extent they continued, after October 16, 2013, to send text messages to consumers who previously responded to advertisements, such as the one on Exhibit

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

But in stating that a company "could be liable for making such calls absent prior written consent" (2012 Order ¶ 68), the FCC was referencing the new written consent requirements—i.e., a signed agreement clearly and conspicuously disclosing the use of an autodialer and that consent is not a condition of purchase. The FCC was not referring to existing consents that were in writing but otherwise not fully in compliance with the new requirements. This is even clearer when the FCC's analysis is considered in its entirety. The FCC broadly addressed the issue of whether *any* form of existing consent would remain valid after October 16, 2013. And the FCC ruled that, after that date, companies could no longer rely on *any* form of existing consent, if such consent did not otherwise fully comply with the new written consent requirements. *See id.* The ongoing validity of existing consents did not turn on whether they were in writing or verbal; rather, it turned on whether the consents were signed agreements with the required clear and conspicuous disclosures. In sum, the FCC rejected the grandfathering of *any* consent that did not fully comply with the new requirements.

This interpretation of the 2012 Order is supported by this Court's decision in *Booth v. Appstack, Inc.*, No. C13-1533JLR, 2015 WL 1466247 (W.D. Wash. Mar. 30, 2015). The purported consents at issue in that case were obtained prior to October 16, 2013. The Court did not apply the new written consent requirements because the defendant stopped its conduct prior to October 16, 2013. However, the Court noted the following:

> To the extent that the putative class members received telemarketing calls from [defendant] after October 15, 2013, the court notes that [defendant] is even further from establishing prior written consent than it is prior express consent: [defendant] has set forth no evidence or argument even attempting to show prior written consent. *See* 47 C.F.R. § 64.1200(a)(2).

Id. at *12 n.7. The consents at issue were obtained from a variety of sources[13] and, thus, may have included consents in writing. Yet the Court did not distinguish between consents made verbally or

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G to the Hoidal Declaration. Sending a text message to Defendants to receive a one-time coupon hardly constitutes consent in writing to receive unlimited text message advertisements.

[13] The defendants' opposition to the plaintiff's motion for class certification (a copy of which is attached as Ex. E to the Hoidal Declaration) describes the "number of different lead sources" from which the 27 million telephone

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

in writing, let alone say that existing consents in writing may have remained valid even if they did not otherwise fully comply with the new written consent requirements. In summary, the 2012 Order did not grandfather existing consents that failed to satisfy the new rule.

B. The 2015 Order confirmed that Defendants violated the TCPA by continuing to rely on consents that did not satisfy the new requirements.

Because the FCC did not grandfather existing consents that failed to satisfy the 2012 Order, it recognized the need for a sunset period to allow companies time to comply. Thus, the FCC delayed the effective date of the written consent requirements for twenty months. *See* 2012 Order ¶ 66. Rather than use that time to obtain new consent from Plaintiff that fully satisfied the new rule, Defendants took no action—instead relying on their own convenient belief about the 2012 Order's effect on existing consents. Nor did Defendants take action with *prospective* consents—even after October 16, 2013, Defendants' website did not include the required disclosures. (*See* Hoidal Decl., Exs. A–D.) Apparently, Defendants misinterpreted the effect of the 2012 Order altogether.

While Defendants stood idle, the Coalition of Mobile Engagement Providers and the Direct Marketing Association petitioned the FCC for relief as to the new written consent requirements. These associations filed their petitions immediately on October 17, 2013. *See* 2015 Order ¶¶ 3 n.7 & 102. When the FCC sought public comments on the above petitions via public notice, numerous entities weighed in—except for Defendants. *Id.* at 84–85. Then, the FCC ruled on the above petitions in its 2015 Order. In that order, the FCC clarified that, indeed, the 2012 Order did not grandfather *any* existing consents that did not otherwise fully satisfy the written consent requirements. *Id.* ¶ 100. While the FCC stated that the language in the 2012 Order "could have reasonably been interpreted" otherwise, the "evidence of confusion" it acknowledged was "on the part of Petitioners." *Id.* ¶ 101. Thus, the FCC granted a limited waiver only to petitioners, not to the industry as a whole. *Id.* ¶ 102. Defendants attempt to now ride the coattails of the petitioners

numbers at issue were derived, including numbers from "ATMs and Redboxes," "content feedback by [] users/customers," and "telephone utility providers." Hoidal Decl., Ex. E at 5–6.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

by arguing that they, too, reasonably interpreted the 2012 Order to mean something other than what it said. From there, Defendants reason that the clarification in the 2015 Order should not be applied retroactively. But Defendants are wrong again.

C. The 2015 Order, merely clarifying an existing rule, is presumptively retroactive.

Defendants contend that the 2015 Order constitutes a new rule or law, which should not be applied retroactively. Defendants' reliance on *Montgomery Ward v. FTC*, 691 F.2d 1322 (9th Cir. 1982), is misplaced. That case does not supply a rule of decision, because its five-factor test applies only where an agency developed **new** law through adjudication. *Id.* at 1328. Rather than announcing new law, the 2015 Order simply clarified a rule that had been in place since October 16, 2013 (and released twenty months prior to that date). In contrast to *Montgomery Ward*, which involved "an adjudicatory restatement of previously articulated law," i.e., an "adjudicatory change to a recently promulgated rule," *id.* at 1329, the 2015 Order makes clear that the intent was to "**clarify** existing law or resolve controversy regarding the interpretation or application of existing law, rules, and precedents." 2015 Order ¶ 22; *see also id.* ¶ 100 ("[W]e … **clarify** our prior-express-written consent requirements.").

Where, as here, an agency has merely clarified its interpretation of an existing rule through adjudication, there is a "**presumption of retroactivity**." *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) ("Retroactivity is the norm in agency adjudications no less than in judicial adjudications .... [W]e have drawn a distinction between agency decisions that substitut[e] ... new law for old law that was reasonably clear and those which are merely new applications of existing law, **clarifications**, and additions. The latter carry a **presumption of retroactivity** that we depart from only when to do otherwise would lead to manifest injustice." (citations and internal quotations omitted)). As the D.C. Circuit recently explained,

> [A] mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct. Clarifications, which obviously fall on the no-manifest-injustice side of the line … must presuppose a lack of antecedent clarity. They stand in contrast to rulings that upset settled

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

> expectations—expectations on which a party might reasonably place reliance. Clarifying the law and applying that clarification to past behavior are routine functions of adjudication.

Qwest Servs. Corp. v. FCC, 509 F.3d 531, 540 (D.C. Cir. 2007). Thus, the clarification in the 2015 Order should be applied retroactively.

Even assuming that the *Montgomery Ward* factors apply—which they do not—the factors do not favor Defendants. As to the first factor (whether the case is one of first impression), this is not an instance where the FCC articulated a standard and then changed it. Again, the 2015 Order merely clarified and confirmed a standard articulated in the 2012 Order.

The second factor (whether the 2015 Order represents an abrupt departure) and third factor (the extent to which Defendants relied on the 2012 Order) likewise favor Plaintiff. The 2015 Order merely clarified that "telemarketers should not rely on a consumer's written consent obtained before the current rule took effect if that consent does not satisfy the current rule." 2015 Order ¶ 100 & Erratum. The clarification in the 2015 Order was the result of the Coalition of Mobile Engagement Providers and the Direct Marketing Association petitioning the FCC for relief from the 2012 Order. The "evidence of confusion" that the FCC acknowledged as to the 2012 Order was "on the part of Petitioners" alone. *Id.* ¶ 101. Thus, only those petitioners (and their members) were granted a limited waiver from the written consequent requirements in order to allow them additional time to come into compliance (*id.* ¶ 102)—demonstrating that, as to all other entities, the FCC expected the written consent requirements to apply beginning October 16, 2013, and that the 2015 Order itself was a retroactive clarification. And again, the FCC sought comments to the petitions via public notice; thus, the 2015 Order could not have come as a "complete surprise" to Defendants. *Montgomery Ward*, 691 F.2d at 1334.

As to the fourth factor (degree of burden in complying with the law), the FCC provided companies twenty months to ease the burden of coming into compliance with the 2012 Order. Yet Defendants failed to take action well past the effective date of the order. And while Defendants claim burden from the potential statutory damages, any statutory damages would be the result of

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

the application of the 2012 Order to Defendants' post October 16, 2013, conduct, not the retroactive application of the 2015 Order.

The final factor (the statutory interest in applying the 2015 Order despite Defendants' reliance on their interpretation of the 2012 Order) also favors Plaintiff. When a regulation stems from the central concern of a statutory scheme, courts tend to find a significant interest in retroactive application. *See Ewing v. N.L.R.B.*, 861 F.2d 353 (2d Cir. 1988). Here, the FCC issued the written consent requirements to serve the TCPA's central concern: protecting the privacy interests of consumers. *See* 2012 Order ¶ 24. Additionally, a strong interest in retroactive application will be found when "non-retroactivity impairs the uniformity of a statutory scheme." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 523 (9th Cir. 2012). The written consent requirements here sought to "advance Congress' objective … to harmonize the Commission's rules with those of the [Federal Trade Commission]." *Id.* ¶ 23. Accordingly, there is a strong interest in having those rules applied, beginning with the date the FCC announced they would be effective, i.e., October 16, 2013.

II. The Court Lacks Jurisdiction to Determine the Constitutionality of the FCC's Regulation and, in Any Event, the Regulation Is Constitutional.

Defendants argue that the written consent rule in the 2012 Order, 47 C.F.R. § 64.1200(a)(2), is unconstitutional under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). As a threshold matter, under the Hobbs Act, 28 U.S.C. § 2342 *et seq.*, this Court does not have jurisdiction to determine the validity of the FCC's regulation. But even if the Court were to rule on the validity of the regulation, the regulation is valid under *Reed*, which did not concern the kind of speech at issue in this case: commercial speech.

A. This Court lacks jurisdiction over Defendants' challenge to the FCC's regulation under the Hobbs Act.

The Hobbs Act grants exclusive jurisdiction to Courts of Appeals to determine the validity

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

of all final orders of the FCC. *See* 28 U.S.C. § 2342 *et seq.*; 47 U.S.C. § 402(a);[14] *see also US W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999). A party seeking to challenge an FCC order may invoke this jurisdiction "only by filing a petition for review of the FCC's final order in a court of appeals naming the United States as a party." *Id.* An FCC "order" for purposes of the Hobbs Act includes regulations. *See, e.g.*, *Cubbage v. Talbots, Inc.*, No. C09-911BHS, 2010 WL 2710628, at *4 (W.D. Wash. July 7, 2010) (FCC regulation is a "final order" within the meaning of the Hobbs Act).

Under the Hobbs Act, a party challenging an FCC regulation as unconstitutional must first petition the agency itself and then, if unsuccessful, appeal the agency's decision directly to the Court of Appeals. *See supra* note 13. This is true even though Defendants challenge the regulation as a defense to Plaintiff's claims. *See United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000) ("A defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction.").

In fact, in a case involving allegations that automated debt-collection calls violated the TCPA, Judge Illston in the Northern District of California initially questioned the validity of the FCC's orders but later vacated her opinion to acknowledge that, under the Hobbs Act, she lacked the authority to do so. *Leckler v. Cashcall, Inc.*, No. C 07-04002 SI, 2008 WL 5000528, at *3 (N.D. Cal. Nov. 21, 2008). Quite simply, "[b]ecause the courts of appeals have exclusive jurisdiction over claims to enjoin, suspend, or invalidate a final order of the FCC, the district courts do not have it." *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461 (11th Cir. 2012). Thus, while the Court may consider the application of the FCC rule to the facts of this case, it does not have

[14] The Hobbs Act gives the federal Courts of Appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. Section 402(a), in turn, includes "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." Together, the two statutes "vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings." *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396–97 (9th Cir.1996).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

jurisdiction to consider Defendants' arguments regarding the constitutionality of 47 C.F.R. § 64.1200(a)(2).

B. Even assuming the Court has jurisdiction, the regulation is constitutional.

Even if the Court does have jurisdiction to consider the validity of the FCC's regulation, Defendants' arguments regarding its constitutionality are unavailing. Defendants contend that the FCC's regulation requiring prior express written consent for automated telemarketing calls is a content-based restriction on speech under *Reed*. In *Reed*, the Supreme Court held that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2228. *Reed*, however, did not concern commercial speech. *Reed* concerned a town's regulation of certain types of signs, in particular, political signs, ideological signs, and directional signs for religious or non-profit events such as church services. *See id.* at 2224–25. In contrast, Defendants' text messages are decidedly commercial speech.[15]

Defendants argue that the Fourth Circuit's application of *Reed* to a South Carolina state statute regulating robocalls is instructive here. (Mot. at 15–17 (citing *Cahaly v. Larosa* , 796 F.3d 399 (4th Cir. 2015)). But *Cahaly*, like *Reed*, did not concern commercial speech and is therefore inapplicable. The robocalls at issue in *Cahaly* were political surveys, which were unlawful under a state statute restricting automated calls depending on whether they were made for consumer, political, or other purposes. *Cahaly*, 796 F.3d at 402. As a content-based restriction on non-commercial speech, the state statute was subject to strict scrutiny. But here, where purely commercial speech is at issue, *Cahaly* is inapposite.

Commercial speech is, of course, still afforded First Amendment protections, as long as it concerns a lawful activity and is not misleading. However, commercial speech occupies a

[15] "Commercial speech" is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Defendants' text message advertising, for example, a large "5-Meat Stuffed Pizza" for $10 (*see* Compl. ¶ 22), is demonstrably commercial speech, relating only to the economic interests of Defendants and the recipients.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

"subordinate position … in the scale of First Amendment values." *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993). It is well-established that purely commercial speech receives a lesser degree of protection under the First Amendment. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634–35 (1995). The Supreme Court outlined the test for evaluating the constitutional validity of restrictions on commercial speech: a reviewing court must ask "whether the asserted governmental interest is substantial," "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). It is this intermediate scrutiny which applies to the FCC's regulation of automated advertising and telemarketing calls.

As courts considering First Amendment challenges regarding commercial speech post-*Reed* have explained, "*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test." *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-CV-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015).[16] Thus, rather than the strict scrutiny applied in *Reed* and *Cahaly*, here, the FCC's regulation should be analyzed under the intermediate level of scrutiny outlined in *Central Hudson*.

The regulation easily survives intermediate scrutiny. First, the government has a substantial interest in protecting the privacy interests of its citizens. As Defendants themselves note, the FCC intended its new regulations to "better protect consumer privacy" by requiring "conspicuous action" in order to consent to autodialed telemarketing calls. (Mot. at 16.) Congress originally enacted the TCPA twenty-five years ago to "protect the privacy interests of residential telephone

[16] *See also Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it."); *Citizens for Free Speech, LLC v. Cnty. of Alameda*, No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015) ("Because the Court follows its previous holding that Section 17.52.515 only applies to commercial speech, the Court must examine that provision under intermediate scrutiny, not strict scrutiny.").

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

subscribers by placing restrictions on unsolicited, automated telephone calls," in response to an increasing number of consumer complaints. S. Rep. No. 102-178 at 1–2, *reprinted in* 1991 U.S.C.C.A.N. 1968.[17] Three years later, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act, which specifically required the FCC to adopt rules prohibiting deceptive and abusive telemarketing acts or practices, including "unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. § 6102(a)(3)(A). Congress has clearly determined that the government's interest in protecting consumer privacy is substantial.[18] The FCC noted in its 2012 Order that it has "continued to receive thousands of complaints" about automated telemarketing calls. 2012 Order ¶ 22.

Second, the prior express written consent requirement directly advances that interest. The FCC found that express written consent, as opposed to express consent, "will reduce the chance of consumer confusion in responding orally to a telemarketer's consent request." *Id.* ¶ 24.

Third, that requirement of express written consent does not reach further than necessary. Express consent was already required. In addition, many entities affected by this regulation are also subject to the FTC's jurisdiction and had therefore already incurred the cost of implementing a written consent requirement. *Id.* ¶ 19. Requiring express consent to be written is a relatively minor step to assure consumers' privacy; the FCC did not, for example, prohibit automated text message advertisements entirely, nor did it restrict them to a limited time window. Instead, the regulation simply requires that express consent, which was already required, now be written and contain specific disclosures. The FCC's regulation allows consumers to receive automated promotional texts by giving consent that satisfies the regulations. By directly advancing the

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[17] As intrusions on privacy, text messages are equivalent to phone calls. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (holding that "a voice message or a text message are not distinguishable [from telephone calls] in terms of being an invasion of privacy").

[18] In addition, the government has a substantial interest in "maximiz[ing] consistency" between the Federal Trade Commission ("FTC") consent requirements and the FCC consent requirements, as expressed in the Do-Not-Call Implementation Act of 2003. *See* 15 U.S.C. § 6153.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

government's interest in protecting privacy rights while not reaching further than necessary, the FCC's rule change forms a "reasonable fit" with the government's interest, just as courts have consistently held as to the TCPA's other means of regulating commercial speech. *See, e.g.*, *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995); *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003); *see also Spafford v. Echostar Commc'ns Corp.*, 448 F. Supp. 2d 1220 (W.D. Wash. 2006) (applying *Central Hudson* test to state statute restricting automated calls and finding a reasonable fit).

For all of these reasons, Defendants' challenge to the constitutionality of the FCC's 2013 rule change must fail, and their summary judgment motion on that basis should be denied.

III. A Stay Is Not Warranted Because the Outcome of *Spokeo* Has No Bearing in This Case, Where Plaintiff Has Alleged Actual Harm.

In the alternative, Defendants ask for a stay of these proceedings pending the Supreme Court's decision in *Spokeo, Inc. v. Robins*. Although Defendants do not wish to wait for summary adjudication in their favor, for purported efficiency reasons, they request a stay in the event they do not prevail. Defendants further claim that the Article III standing issue to be decided in *Spokeo* would be potentially dispositive of this action.

Were this really the case, the orderly, resource-conserving approach would have been for Defendants to ask for a stay at the inception of this case. Then, if *Spokeo* favored them, Defendants could bring a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, rather than asking the Court to make a decision on the merits now. Instead, Defendants propose piecemeal litigation that wastes judicial resources and time on their Rule 56 motion which should be denied, as should their motion for stay.

A. Plaintiff suffered actual harm and damages, rendering the outcome in *Spokeo* irrelevant.

The Article III standing issue to be decided in *Spokeo* is not dispositive. Thus, Defendants cannot demonstrate they meet the exceptions to the general rule that "[o]nly in **rare circumstances**

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). The rule of law to be decided in *Spokeo* will not solely define the rights of Plaintiff and the proposed Class.

In *Spokeo*, the Ninth Circuit held that the district court erred in dismissing the plaintiff's complaint for lack of subject matter jurisdiction. The Court of Appeals found that the plaintiff had adequately alleged Article III standing because the statute at issue—the Fair Credit Reporting Act ("FCRA")—conferred statutory standing, and did not require allegations of actual harm or damages. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014). The Supreme Court took certiorari on April 27, 2015, and set a hearing for November 2, 2015.

The Supreme Court is likely to affirm *Spokeo* because the Ninth Circuit's reasoning is in line with every other Circuit Court of Appeals decision on whether Article III standing exists for a claim based on a violation of a consumer protection statute that provides for a measure of statutory damages where harm is otherwise difficult to measure. *See Palm Beach Golf Ctr.- Boca, Inc. v. John G. Sarris, D.D.C., P.A.*, 781 F.3d 1245, 1251 (11th Cir. 2015) ("Thus, where a statute confers new legal rights on a person, that person will have Article III standing to sue where the facts establish a concrete, particularized, and personal injury to that person as a result of the violation of the newly created legal rights."); *Hammer v. Sam's E., Inc.*, 754 F.3d 492, 498–99 (8th Cir. 2014) (finding standing in FCRA case and stating "[i]t is of no consequence that appellants' injury is dependent on the existence of a statute"); *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("The deprivation of such a statutory right may constitute an injury-in-fact sufficient to establish standing, even though the plaintiff 'would have suffered no judicially cognizable injury in the absence of [the] statute.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 514 (1975))); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) ("A plaintiff need not demonstrate that he or she suffered actual monetary damages, because the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights,

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

the invasion of which creates standing." (internal quotations omitted)); *Murray v. GMAC Mortg., Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury."); *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006) ("Congress may expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights.").

Putting aside the likely outcome in *Spokeo*, that decision will not impact this case. Contrary to what Defendants represent, Plaintiff alleges that he and other class members were actually harmed by repeated, unwanted text messages. (Compl. ¶¶ 1, 3, 4, 5, 23; *see also* Lennartson Decl. ¶ 2.) In sharp contrast to the plaintiff in *Stone v. Sterilng Infosys., Inc.*, No. 15-711, 2015 WL 4602968, at *1 (E.D. Cal. July 29, 2015), Plaintiff alleges that these messages actually harmed him and fellow consumers because they have to "pay cell phone providers for the receipt of such spam," and because these "messages diminish battery life, waste data storage capacity, and are an intrusion upon privacy and seclusion." (Compl. ¶¶ 4, 23; Lennartson Decl. ¶ 2). Plaintiff also alleges ongoing conduct, and therefore requests injunctive and declaratory relief.[19] Accordingly, no matter how *Spokeo* is decided, Plaintiff has Article III standing.

At least one district court presiding over a TCPA case refused a stay pending the decision in *Spokeo*, stating it would not "assign precedential significance to the fact that the Supreme Court has granted certiorari," and that the court has "no way of divining whether the Supreme Court will decide the *Spokeo* case in a manner as to benefit the Defendant's position with regard to the Plaintiff's lack of standing to pursue this case for himself and those similarly situated to him." *Speer v. Whole Food Market Group, Inc.*, No. 14-3035, 2015 WL 2061665, at *1 (M.D. Fla. 2015); *see also Doe v. Selection.com*, No. 15-cv-2338, 2015 WL 5853700, at *1 (N.D. Cal. Oct. 8, 2015)

[19] Defendants claim that on June 15, 2015, they ceased sending text messages to individuals who opted in prior to October 16, 2013. Injunctive relief, however, may remain available to the extent Defendants continue to send text message advertisements to individuals who opted in after that date, in light of evidence that, after October 16, 2013, Defendants continued to obtain opt-ins using non-compliant language. *See* Hoidal Decl., Exs. A–D.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

("Doe's alleged injuries [under FCRA] clearly provide standing to pursue his claims no matter what the Court decides in *Spokeo* …. ").

B. Defendants do not otherwise meet the *CMAX* factors.

In considering a stay motion, the Court must exercise sound discretion and weigh "competing interests," including: (1) "the possible damage which may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Where a plaintiff seeks injunctive relief against ongoing and future harm, the party seeking the stay bears the burden on all factors and "must make out a clear case of hardship or inequity." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (citing *Landis*, 299 U.S. at 255).

1. Defendants failed to demonstrate hardship.

It is well-settled that the costs of defending a suit, without more, do not constitute hardship or inequity. *Id.* at 1112; *Washington v. Internet Order, LLC*, No. 14-1451, 2015 WL 918694, at *6 (W.D. Wash. 2015). This case is in its beginning stages: the parties have just served initial disclosures, and no scheduling order has been entered setting forth the dates for pre-trial motions or discovery. Defendants have not demonstrated any prejudice to them, other than having to go forward with defending a meritorious case.

2. The orderly course of justice would not be promoted by a stay.

Defendants pay lip service to the "orderly course of justice," while doing nothing to uphold it. As noted, Defendants have moved for summary judgment on the merits of Plaintiff's claims and the constitutionality of the written consent requirements, even though they believe that the Court may ultimately be divested of subject matter jurisdiction. The fact that Defendants have asked for a decision on the merits demonstrates that they do not really believe the Supreme Court's decision will simplify the "issues, proof, and questions of law" in this case. *CMAX*, 300 F.2d at 268. In

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

addition, the Supreme Court has long prohibited courts from ruling "upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so" because such a pronouncement "is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). It makes no sense to argue that proceeding with this litigation would waste judicial resources when, in fact, Defendants are asking for the Court to rule on the merits when a potential jurisdiction issue purportedly exists.

3. Plaintiff will be prejudiced by a stay.

A stay will unduly prejudice Plaintiff's ability to litigate this case to conclusion in a fair and efficient manner. "[B]ecause the accuracy of testimony and the availability of witnesses may diminish with time, this delay could endanger evidence preservation." *McKellips v. Franciscan Health Sys.*, No. 13-5096, 2013 WL 1991103, at *2 (W.D. Wash. 2013) (citing *United States v. Mays*, 549 F.2d 670, 680 (9th Cir.1977)). In addition, courts in the Ninth Circuit, including this District, have found prejudice where the plaintiff sought to enjoin on-going conduct, as Plaintiff does here. *See, e.g.*, *Lockyer*, 398 F.3d at 1112 (denying stay and stating "[u]nlike the plaintiffs in *CMAX* … , who sought only damages for past harm, the Attorney General seeks injunctive relief against ongoing and future harm"); *Zillow, Inc. v. Trulia, Inc.*, No. 12-1549, 2013 WL 594300, at *4 (W.D. Wash. Feb. 15, 2013) (finding defendant failed to meet factors in the stay because the plaintiff alleged on-going patent infringement); *Del Vecchio v. Amazon.com*, No. 11-0366, 2011 WL 1585623, at *1 (W.D. Wash. Apr. 27, 2011) ("[P]laintiffs could suffer prejudice by a potentially lengthy discovery stay, in part because they seek to enjoin on-going allegedly wrongful conduct.").

The balance of harms weighs in favor of denying Defendants' request for a stay.

CONCLUSION

Based on the foregoing, Plaintiff John Lennartson respectfully requests that this Court DENY in its entirety Defendants' Motion for Summary Judgment or, in the Alternative, for Stay.

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

DATED this 13th day of October, 2015.

KELLER ROHRBACK L.L.P.

By *s/Mark A. Griffin*

Mark A. Griffin, WSBA #16296
Karin B. Swope, WSBA #24015
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel: (206) 623-1900
Fax: (206) 623-3384
mgriffin@kellerrohrback.com
kswope@kellerrohrback.com

ZIMMERMAN REED, LLP
June P. Hoidal (*Pro Hac Vice*)
1100 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Tel: (612) 341-0400
Fax: (612) 341-0844
June.Hoidal@zimmreed.com

Bradley C. Buhrow (*Pro Hac Vice*)
14646 N. Kierland Blvd., Suite 145
Scottsdale, AZ 85254
Tel: (480) 348-6400
Fax: (480) 348-6415
Brad.Buhrow@zimmreed.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/Mark A. Griffin
Mark A. Griffin, WSBA #16296

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHN LENNARTSON, on behalf of himself and all others similarly situated,

Plaintiff,

v.

PAPA MURPHY'S HOLDINGS, INC.; and PAPA MURPHY'S INTERNATIONAL, L.L.C.,

Defendants.

No. 3:15-cv-05307-RBL

DECLARATION OF JUNE HOIDAL IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR STAY

June P. Hoidal, under penalty of perjury under the laws of the State of Washington, declares that the following is true and correct:

1. I am a partner in the law firm of Zimmerman Reed and one of the attorneys for the Plaintiff in this case. I am a member of the bar of Minnesota, have been admitted pro hac vice in this case, and am competent to testify to the matters stated herein. I submit this Declaration in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, for Stay.

2. Attached as **Exhibit A** is a true and correct screenshot I made on October 12, 2015 from https://archive.org/web/ ("Internet Archive WayBack Machine"), which provides a snapshot

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

of Papa Murphy's archived webpage from January 31, 2014, and which contains the following language:

> To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive four text messages per month. To unsubscribe from our text club at any time, text **STOP** to **90421**. For questions or help with the text club, text **HELP** to **90421**, or call 800-257-7272, or email us at guestservices@papamurphys.com.

3. Attached as **Exhibit B** is a true and correct screenshot I made on October 12, 2015 from https://archive.org/web/ ("Internet Archive WayBack Machine"), which provides a snapshot of Papa Murphy's archived webpage from March 30, 2014, and which contains the following language:

> To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive four text messages per month. To unsubscribe from our text club at any time, text **STOP** to **90421**. For questions or help with the text club, text **HELP** to **90421**, or call 800-257-7272, or email us at guestservices@papamurphys.com.

4. Attached as **Exhibit C** is a true and correct screenshot I made on October 12, 2015 from https://archive.org/web/ ("Internet Archive WayBack Machine"), which provides a snapshot of Papa Murphy's archived webpage from March 7, 2015, and contains the following language:

> You're just one step away from making your life easier! Why search around your house and car for the best Papa Murphy's coupons when the most exclusive offers can be sent directly to your inbox or phone? So sit back and relax (we know it's rare), and wait for the money saving offers to come your way.

5. Attached as **Exhibit D** is a true and correct screenshot I took on March 11, 2015, from http://www.papamurphys.com/deals.

6. Attached as **Exhibit E** is a true and correct copy of Defendants Appstack, Inc., Steve Espinosa, and John Zdanowski's Opposition to Plaintiff's Motion for Class Certification (Doc. 41) in *Booth v. Appstack, Inc., et al.*, Case No. 2:13-cv-01533-JLR (W.D. Wash.).

7. Attached as **Exhibit F** is a true and correct copy of *In re Rules & Regulations Implementing the TCPA of 1991*, Erratum (July 28, 2015).

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

8. Attached as **Exhibit G** is a true and correct copy of Rimma Kats, *Papa Murphy's grows mobile database, pushes offers via SMS campaign*, Mobile Commerce Daily (Sept. 23, 2011), *available at* http://www.mobilecommercedaily.com/papa-murphy%E2%80%99s-grows-mobile-database-pushes-offers-via-sms-campaign.

DATED this 13th day of October, 2015 at Minneapolis, Minnesota.

ZIMMERMAN REED, LLP

s/ June P. Hoidal
June P. Hoidal, Admited Pro Hac Vice

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/Mark A. Griffin
Mark A. Griffin, WSBA #16296

KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
TELEPHONE: (206) 623-1900
FACSIMILE: (206) 623-3384

Exhibit A

Papa Murphy's TAKE 'N BAKE PIZZA

MENU LOCATIONS DEALS ECLUB

FIND YOUR STORE City, State or Zip Code Sub

eClub

Join the eClub.

We'll send fresh-baked savings right to your inbox.

Email

Why go looking for a deal when you can have one sent right to your inbox? Papa Murphy's eClub members enjoy great deals all year long. For more information, see our Privacy Policy.

Deals

Check out exclusive Papa Murphy's coupons in your area.

GET THE DEALS

http://emus.papamurphys.com/eclubProduction-new.asp

Latest

Show All

To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive four text messages per month. To unsubscribe from our text club at any time, text **STOP** to **90421** . For questions or help with the text club, text **HELP** to **90421** , or call 800-257-7272 , or email us at guestservices@papamurphys.com.

eClub FAQ

Didn't receive your birthday email?

Didn't receive your opt-in message after signing up?

Didn't get any messages from the Papa Murphy's eClub lately?

OUR STORY JOIN OUR FAMILY WATCH OUR VIDEO

The concept of "take-n-bake" pizza was invented by Papa Murphy's in 1981. But today, we focus on what has made Papa Murphy's the fifth largest pizza company in the United States and Zagat's #1 Rated Pizza Chain: our commitment to FRESH.....Read More

Looking for FRESH business opportunities? Convert your passion for pizza into a rewarding career.

FRANCHISE OPPORTUNITIES

CAREER OPPORTUNITIES

FAQs Gift Cards Press Room Contact Us Privacy Policy Terms & Conditions Site Map

Exhibit B

Papa Murphy's TAKE 'N BAKE PIZZA

FIND YOUR STORE
City, State or Zip Code Sub

MENU LOCATIONS DEALS ECLUB

eClub

Join the eClub.

We'll send fresh-baked savings right to your inbox.

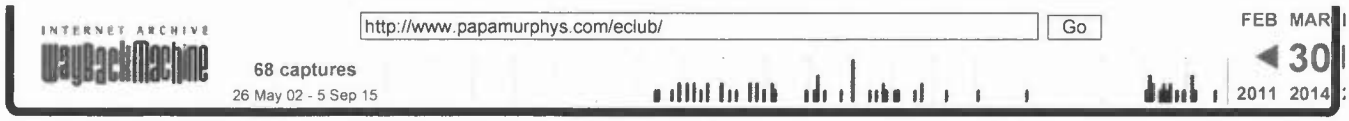
Email

Why go looking for a deal when you can have one sent right to your inbox? Papa Murphy's eClub members enjoy great deals all year long. For more information, see our Privacy Policy.

Deals

Check out exclusive Papa Murphy's coupons in your area.

GET THE DEALS



Text

To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive four text messages per month. To unsubscribe from our text club at any time, text **STOP** to **90421** . For questions or help with the text club, text **HELP** to **90421** , or call 800-257-7272 , or email us at guestservices@papamurphys.com.

http://www.phizzlemobile.com/papa_murphys_form.php

Latest

Show All

Page cannot be crawled or displayed due to robots.txt.

See www.phizzlemobile.com robots.txt page. Learn more about robots.txt.

eClub FAQ

Didn't receive your birthday email?

Didn't receive your opt-in message after signing up?

Didn't get any messages from the Papa Murphy's eClub lately?

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Looking for FRESH business opportunities? Convert your passion for pizza into a rewarding career.

FRANCHISE OPPORTUNITIES

CAREER OPPORTUNITIES

Exhibit C

Papa Murphy's TAKE 'N BAKE PIZZA

FIND YOUR STORE
City, State or Zip Code Sub

MENU ORDER DEALS

Exclusive Offers

You're just one step away from making your life easier! Why search around your house and car for the best Papa Murphy's coupons when the most exclusive offers can be sent directly to your inbox or phone? So sit back and relax (we know it's rare), and wait for the money saving offers to come your way.

Sign up now!

First Name Last Name

Email Mobile Number

Zip/Postal Code Birthday

MM DD

☐ Sign me up for email deals
☐ Sign me up for mobile deals
☐ I'm over 18 SUBMIT

If you are one of our Canadian customers, you aren't left out. Just sign up at papamurphys.ca/eclub.
For more information, see our Privacy Policy.

eClub FAQ

Didn't receive your email opt-in message after signing up?

Try this, add eClub@reply.papamurphys.com to your email address book. Also, check the Junk/Spam box in your email program to see if the message came there by accident, then you can mark it as legitimate so future emails come to your inbox instead.

Didn't get any messages from the Papa Murphy's eClub lately?

To ensure delivery, add eClub@reply.papamurphys.com to your email address book..

OUR STORY

The concept of "take-n-bake" pizza was invented by Papa Murphy's in 1981. But today, we focus on what has made Papa Murphy's the fifth largest pizza company in the United States and Zagat's #1 Rated Pizza Chain: our commitment to FRESH.....Read More

JOIN OUR FAMILY

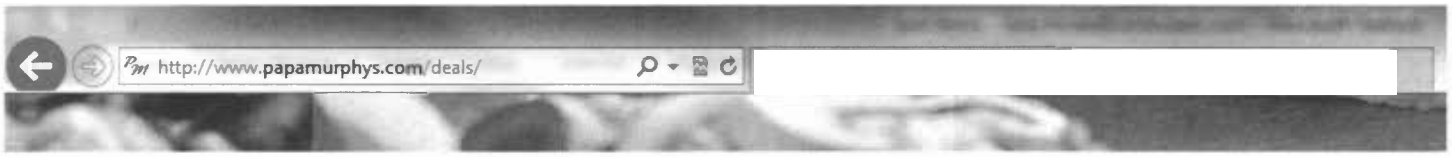
Looking for FRESH business opportunities? Convert your passion for pizza into a rewarding career.

FRANCHISE OPPORTUNITIES

CAREER OPPORTUNITIES

WATCH OUR VIDEO

Exhibit D



Join our Family.

You're just one step away from making your life easier! Why search around your house and car for the best Papa Murphy's coupons when the most exclusive offers can be sent directly to your inbox or phone? So sit back and relax (we know it's rare), and wait for the money saving offers to come your way.

Sign up now!

First Name

Last Name

Email

Mobile Number

Zip/Postal Code

Birthday

☐ Sign me up for email deals

☐ Sign me up for mobile deals

☐ I'm over 18

SUBMIT

Exhibit G

- Mobile Commerce Daily - http://www.mobilecommercedaily.com -

Papa Murphy's grows mobile database, pushes offers via SMS campaign

Posted By Rimma Kats On September 23, 2011 @ 4:30 am In Featured,Food and beverage,Messaging | No Comments

[1]Pizza chain Papa Murphy's is adding mobile to its marketing efforts and offering consumers exclusive offers via SMS.

The company partnered with Phizzle for the mobile marketing initiative. Papa Murphy's is using mobile to grow fan loyalty and increase customer revenues.

"Papa Murphy's is looking to provide to the company's franchise owners a low-cost, easy-to-administer method of marketing to customers," said Jenifer Anhorn, chief marketing executive at Papa Murphy's.

"Papa Murphy's had not done much in the way of mobile marketing previously," she said. "Papa Murphy's wanted to get involved in digital marketing to complement Papa Murphy's traditional tools such as print, radio and broadcast.

"Our goal is to help the franchise owners increase sales through corporate marketing initiatives."

Papa Murphy's [2]operates more than 1,250 franchised and corporate-owned locations in 37 states and Canada.

Phizzle [3]is a mobile marketing and advertising provider delivering audience engagement services to grow fan loyalty, increase customer revenues and harness brand equity.

Pizza pizza
Papa Murphy's is running customized in-store signage, mobile campaigns and promotions featuring mobile text alerts to develop an opt-in mobile database.

Consumers can opt-in to receive notifications 3-4 times each month at their favorite locations.

The alerts feature free or discounted pizza, additional toppings or size upgrades.

"Partnering with Phizzle enables Papa Murphy's to gather phone numbers and email addresses," Ms. Anhorn said. "List building is the first step to being able to leverage the names and numbers when offers are blasted."

Word of mouth
Papa Murphy's is getting the word out about the campaign via in-store point-of-sale material and small flyers that are placed on each pizza box.

[4]

An example of a small flyer

"More and more people are using smartphones and texting, especially the younger customers," Ms. Anhorn said. "This is just where marketing is going.

"Presently, five Papa Murphy's restaurants are participating, with several more in the works now and the goal is to get 20-30 ramped up in the next 2-3 months," she said.

Final Take
Rimma Kats is staff reporter on Mobile Commerce Daily, New York

[5] [6] [7]

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[4] Image: **http://www.mobilecommercedaily.com/wp-content/uploads/2011/09/pizza2.jpg**
[5] Image: **https://www.facebook.com/sharer/sharer.php?u=http%3A%2F%2Fwww.mobilecommercedaily.com%2Fpapa-murphy%25e2%2580%2599s-grows-mobile-database-pushes-offers-via-sms-campaign&t=Papa+Murphy%E2%80%99s+grows+mobile+database%2C+pushes+offers+via+SMS+campaign**
[6] Image: **http://www.linkedin.com/shareArticle?mini=true&url=http%3A%2F%2Fwww.mobilecommercedaily.com%2Fpapa-murphy%25e2%2580%2599s-grows-mobile-database-pushes-offers-via-sms-campaign&title=Papa+Murphy%E2%80%99s+grows+mobile+database%2C+pushes+offers+via+SMS+campaign**
[7] Image: **https://twitter.com/share?url=http%3A%2F%2Fwww.mobilecommercedaily.com%2Fpapa-murphy%25e2%2580%2599s-grows-mobile-database-pushes-offers-via-sms-campaign&text=Papa+Murphy%E2%80%99s+grows+mobile+database%2C+pushes+offers+via+SMS+campaign&via=MCommerceDaily**